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No. 97-731

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

UNITED STATES OF AMERICA, *Petitioner,*

v.

CHRIS W. BEGGERLY, ET AL., *Respondents.*

On Writ of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

Brief of Respondents
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QUESTIONS PRESENTED

1. Whether the district court had ancillary jurisdiction to hear this case?
2. Whether the Fifth Circuit correctly held that the 12-year statute of limitations contained in the Quiet Title Act was equitably tolled until a mistake or misrepresentation was discovered?
3. Whether the Fifth Circuit correctly held that respondents had title to the subject property?

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STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of 28 U.S.C. § 2409a and Federal Rule of Civil Procedure 60(b) are set forth in the appendix to petitioner's brief. The Fifth Amendment to the United States Constitution states in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT

1.) In 1950, Clark M. Beggerly, Sr., respondents' predecessor-in-interest, purchased 729 acres of land on Horn Island, a Mississippi barrier island.[1] After the purchase, the Beggerly family's ownership was generally known and recognized by the local residents, the county, state and federal governments and they continuously paid property taxes on the land. J.A. 86.[2]

In September 1971, the Department of Interior offered to purchase respondents' land for inclusion in a national park.[3] However, no sale was ever finalized. J.A. 89.

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[1] Respondent James R. Beggerly is sole owner of four lots that constitute 626 acres of the subject property. All respondents have joint ownership of the remaining 103 acres of the subject property.

[2] Petitioner states that "In this case, for example, the United States has openly acted as owner of Horn Island since 1803 . . ." Pet. Brief at 26. However, petitioner cites no portion of the record to justify this assertion – a claim which is belied by petitioner's admission that, "in 1972, the National Park Service began appraising lands within the boundaries of GINS, including some lands on Horn Island, as an initial step toward acquisition of properties." Pet. Brief at 5. Petitioner likewise fails to explain the necessity for filing the *Adams* action against approximately 200 Horn Island landowners.

[3] On January 8, 1971, Congress adopted legislation authorizing the Department of Interior to develop a new federal park, the Gulf Islands National Seashore Park. The purpose of the Act was to protect and preserve the natural, historic and recreational values of certain barrier islands in the Gulf. Pub. L. 91-660; 84 Stat. 1967 (codified at 16 U.S.C. § 459h to 459h-10). It included three Mississippi barrier islands, Horn, Petit Bois, and Ship Islands.

2.) In September 1979, the government filed a quiet title action in the United States District Court for the Southern District of Mississippi, claiming that the respondents' title was void. *United States v. Adams*, Civil Action No. S79-0338 (R). J.A. 38. In the complaint, the government asserted that the United States had acquired the property as part of the Louisiana Purchase in 1803; that the United States had never issued a patent, nor had it otherwise conveyed the property and that respondents' claims to title were without any right whatsoever and constituted a cloud on the government's title. J.A. 43.

In early 1982, the government filed a summary judgment motion and supporting brief which stated that "no land grants had been issued by France, Spain, or Britain . . . before or after the Louisiana Purchase." J.A. 228. This introductory statement was followed by a detailed argument with the following heading: "There Were No Foreign Land Grants Ever Issued On the Subject Lands." J.A. 233-35.[4]

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[4] In fact, at the time that these statements were made, the government had not researched the files in the National Archives for foreign land grants even though the government knew that the National Archives was a likely place to find such grants. Michael Knipfing, Deputy Chief, Branch of Lands and Title Adjudication in the Bureau of Land Management, J.A. 187-89, testified in his deposition given on June 29, 1982, that he had recommended to the government attorneys that research be done in the National Archives in Washington, D.C. and that as of the date of the

In a subsequent deposition given on October 14, 1982, Mr. William Dorasavage, Chief, Branch of Lands and Title Adjudication, Bureau of Land Management, testified that the week before his deposition, which was given on October 14, 1982, he had a land law examiner specialist examine the documents in the National Archives in Washington along with two other archives in the D.C. area and that as a result of his research, he had determined that there were no private land claim disposals on Horn Island. J.A. 222-24.

During the pendency of the government's quiet title suit, respondents made a diligent effort to find a valid patent or grant to support their title. J.A. 108. At the same time, the government consistently misrepresented to the respondents and the court that there was no grant or patent validating the respondents' title. J.A. 107. Unable to find a grant or patent, and faced with the court's admonition that without it they would lose, J.A. 108, in December 1982, on the eve of trial, the respondents were forced to accept a nominal settlement of approximately $200 per acre, an amount that

deposition, no one had in fact done research for land grants there. J.A. 192, 193-94.

fell short of the true market value of their property.[5] J.A. 109.

3.) Although they had lost title to their property, respondents continued to search for a patent. They contacted state, local, and federal officials and filed Freedom of Information Act requests. J.A. 68. As a result of their research, they concluded that the most likely source of a grant would have been from the Spanish government during the latter part of the Eighteenth Century when Spain had sovereignty over the area. Having reached this conclusion, respondents hired a genealogist in Washington, D.C. to research records in the National Archives. J.A. 92.

After reviewing over seventy-five files, in 1991 the genealogist finally found what the government could (or would) not, the Boudreau Grant in the Civil Records Branch of the National Archives in Washington, D.C.. J.A. 96. That land grant had been presented to and recorded by the United

[5] Soon after filing the action to quiet title to Horn Island, the government filed a condemnation action to acquire Petit Bois Island located about two miles east of Horn Island for inclusion in the Gulf Island National Seashore Park. After a valuation hearing, the court ruled that the fair market value of the Petit Bois property was $8,000 per acre for the surface rights to the land and $6,000 for the mineral rights to the land. J.A. 109. *United States v. 717.42 Acres of Land, More or Less Situated in the County of Jackson, State of Mississippi and Petit Bois, Inc., et al.*, Cause No. S80-0450 (N), United States District Court for the Southern District of Mississippi.

States government in 1816 and it has remained in the custody and control of the government ever since. J.A. 115.

Upon discovery of the land grant, respondents, acting on their own and without legal counsel, promptly contacted the Department of Interior requested that their title be recognized and that a patent be issued. J.A. 69. The government wrote a ten-page letter, prepared with the assistance of the Solicitor's office, advising that the "Boudreau Grant" was not valid because it had not been confirmed.[6] J.A. 73-83.

4.) Having no other recourse, respondents filed the instant lawsuit in federal district court on June 1, 1994, just three years after having discovered the land grant that the government mistakenly told the court in its quiet title action in 1979 did not exist. The instant lawsuit requests that the court set aside the 1982 settlement agreement and consent judgment that was obtained by the government and entered on an erroneous statement of fact. The district court dismissed respondents' complaint, and denied their motion for summary judgment, reasoning that the court lacked

[6] The government's representation that the "Boudreau Grant" had to be confirmed to be valid was a misstatement of law. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51, 86-87 (1833), which states that a complete and final Spanish grant was valid and binding without confirmation.

jurisdiction to hear the case pursuant to either a Rule 60(b) motion or an independent action at equity. Pet. App. 40a-41a.

5.) The U.S. Court of Appeals for the Fifth Circuit reversed. The court below concluded that the district court had jurisdiction to hear respondents' claims as an independent action in equity, because that action which had been filed in the same court that rendered the original judgment, was really a continuation of the original action for purposes of subject matter jurisdiction. Pet. App. 4a-5a. The Court of Appeals also held that respondents should have been permitted to amend their complaint to include a claim under the Quiet Title Act, 28 U.S.C. § 2409a, holding that the time-ban was equitably tolled in instances where "the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his rights." Pet. App. 9a-10a. Finally, the Court of Appeals set aside the judgment in the *Adams* litigation that had been based on a mistake of fact. Pet. App. 6a-9a. Accordingly, the Court of Appeals remanded the case to the trial court with instructions to quiet title to the subject property in the respondents. Pet. App. 10a.

SUMMARY OF THE ARGUMENT

At its core, this case presents one critical issue: When a court decree wrongfully vests title to land in the United States as a result of misrepresentations and misstatements of fact, is that court powerless to remedy that miscarriage of justice? Traditional legal principles support the conclusion that the United States should not retain legal title to land which it does not rightfully own. Petitioner here argues for the abandonment of those well-established rules of law, urging instead a barrage of technical arguments which are both inequitable and just plain inconsistent with recent decisions of this Court and of most other courts that have looked at these issues. Respondents argue, in contrast, that no legitimate reason has been put forward for destroying the concepts of independent actions, equitable tolling, due process and principles of international law which have served our system of justice well over the years.

First, petitioner argues that Rule 60(b) provides the exclusive remedy for setting aside a judgment obtained by misrepresentation or mistake of fact, a position directly contrary to the cases (both before and after the adoption of Rule 60(b)) that employ the "independent action" remedy to invoke the ancillary jurisdiction of the original court to reform an erroneous judgment. (*See, e.g., Jones v. Anderson-*

Tully Co., 722 F.2d 211 (5th Cir. 1984); *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505 (1884)). Petitioner's position would eliminate this traditional and admittedly narrow but useful ameliorative procedure for all private litigants as well as the government. The result would be a rule that a misrepresentation or mistake, concealed or undiscovered for more than a year (the Rule 60(b) limitation), would be beyond all power of the court to remedy, regardless of the injustice involved. Petitioner presents no rationale for rejecting half a century of post-Rule 60(b) jurisprudence; accordingly, its petition for wholesale change in the law of ancillary jurisdiction to reform erroneous judgments should be rebuffed.

Similarly, petitioner's claim of exemption from traditional principles of equitable tolling of the statute of limitations for fraud, mistake or misrepresentation would require this Court to overrule (or at least drastically restrict) its holding in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), that sovereign immunity does not preclude application of the doctrine in appropriate cases brought against the government. Adoption of petitioner's position would also require an explicit overruling of the Ninth Circuit's recent decision in *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995) *vacated*, 117 S. Ct. 1103, *orig. opinion reinstated*, 113 F.3d 167 (9th Cir. 1997), specifically

rejecting the statutory and legislative history arguments put forth anew in this matter. The simple truth is that nothing in the Quiet Title Act's language or its legislative history remotely supports the claim that, once the government wrongfully asserts a title claim and thereafter obtains a judgment based on that misrepresentation, sovereign immunity creates an absolute bar to obtaining a true judgment of title. Nor does petitioner put forward any sound reason why the misrepresentation, once discovered, should be ignored by the court and the government alike, allowing the United States to retain title wrongfully obtained by negligence or trick.

Indeed, a holding which legalizes the wrongful taking of respondents' property would not pass constitutional muster. The Fifth Amendment's prohibitions of deprivation without due process, and against taking for public use without just compensation, are affronted by a legal scheme which transfers title to the United States without a fair process (*i.e.*, through misrepresentation or mistake) and without paying the rightful owner for his land. *See*, *e.g.*, *United States v. James Daniel Good Real Property*, 510 U.S. 43, 50 (1993)(purpose of the Due Process Clause is "to minimize substantively unfair or mistaken deprivation of property.") and *Hodel v. Irving*, 481 U.S. 704 (1987)(government's taking title to fractionated interests in

property without payment of just compensation violated Fifth Amendment.).

Finally, having failed to put forward a procedural bar which would avoid the merits, petitioner sets forth a lame argument that the Spanish land grant which took this property out of the public domain in 1781 was ineffective because dictum in an earlier case stated that Sr. Galvez did not have legal authority to convey the land. Apart from the defect that such a fact (even if true) is not legal precedent—especially not with regard to different property and a case presenting different facts and documents—this Court has never treated its holdings on foreign law as binding precedent. Rather, this Court sensibly examines the law of the country (in this case, Spain), which is not a common law country and does not employ the rule of *stare decisis*, applying it to the facts of the case at bar. *Summe Corp. v California ex rel. Lands Comm'n*, 466 U.S. 198 (1984). A judicial decision on a point of foreign law does not constitute a binding precedent. *See* R.B. Schlesinger *et al.*, *Comparative Law* 88 (5th ed. 1988). Petitioner's effort to overthrow these ancient rules of law, substituting the doctrine of *stare decisis* in their stead, would do violence to at least a century of established law, creating havoc in multinational and international legal application.

In sum, respondents believe that the law is not powerless to right the wrong committed when the United States obtained title to their land by misrepresentation. The court below properly decided that, in the limited circumstances of this case (where the United States filed suit and obtained title to respondent's land by presenting false facts), no legal nicety prevents the court from correcting its error. That judgment is legally sound, common-sense—and should be affirmed.

ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION TO DECIDE THIS CASE.

A. When the United States Waived Sovereign Immunity by Filing Its 1979 Quiet Title Action, It Also Submitted Itself To Ancillary Jurisdiction of the District Court In 1994 To Correct Fraud or Mistake.

In 1979, the United States filed a lawsuit pursuant to 28 U.S.C. §1345 seeking to establish ownership of respondents' property. J.A. 38. In so doing, the United States waived its sovereign immunity with regard to all defenses and counterclaims encompassed within its own claims. *Carr v. United States*, 98 U.S. 433, 438 (1878)("when the government itself seeks its rights at the hands of the court,

equity requires that the rights of other parties interested in the subject matter should be protected."); *see also United States v. Tsosie*, 92 F.3d 1037, 1043 (10th Cir. 1996)("when the United States institutes a suit, it thereby consents . . . to the full and complete adjudication of all matters and issues which are reasonably incident thereto.") and *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967)("When the sovereign sues it waives immunity as to claims of the defendant which assert matters . . . arising out of the same transaction or occurrence which is the subject matter of the government's suit.") Since an independent action brought in the same court that rendered the judgment of an original action is a continuation of the first action and invokes the ancillary jurisdiction of that court, an independent waiver of sovereign immunity is likewise not required. *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505, 521-522 (1884) (holding that where the federal court had jurisdiction of the original suit, it also had jurisdiction over a later action to set aside judgment on grounds of unfaithful conduct of officers of party to suit); *see also West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702 (5th Cir. 1954)(holding that court of equity has jurisdiction to re-open judgment in cases of mistake); *Crosby v. Mills*, 413 F.2d 1273 (10th Cir. 1969)(holding that the court has ancillary jurisdiction over action for relief from judgment in same

court regardless of the absence of diversity of citizenship); and, *Butler v. Ungerleider*, 187 F.2d 238 (2d Cir. 1951)(granting ancillary jurisdiction to suit in the same court modified original action). Ancillary jurisdiction of the court rendering the original judgment is so broad as to encompass independent actions even where subject matter or diversity jurisdiction would no longer be present for the original lawsuit. *Pacific R.R.*, 111 U.S. at 521-22; *see generally* 7 James W. Moore, *Moore's Federal Practice*, § 60.84 and Wright & Miller, § 2868 ("In an independent action for relief from a judgment, there is ancillary jurisdiction over the action despite the absence of a federal question or of diversity of citizenship or of the requisite amount in controversy.").

Even Rule 60(b) of the Federal Rules of Civil Procedure, which codifies certain equitable remedies of a court, specifically preserves the common law remedy of independent actions, relying on ancillary jurisdiction: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding." Fed. R. Civ. P. 60(b). *See also Treadway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418, 1420 (9th Cir. 1986)(citing Moore's Federal Practice for the proposition that "[t]his power is one that is rooted in tradition and governed by general equitable principles."); *Herring v.*

Federal Deposit Ins. Corp., 82 F.3d 282, 285 (9th Cir. 1995)("Rule 60(b) does not grant anyone standing to bring an independent action; it merely does not restrict any standing a party otherwise has."). The Advisory Committee Notes to Rule 60 further explain that no new right of action is created by the "saving clause" of Rule 60; rather, it merely preserves "a procedural remedy . . . by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action." Fed. R. Civ. P. 60(b) advisory committee note of 1946.

Accordingly, the court below properly rejected the sterile formalism advocated by the government in favor of a rule that looks to the substance of the relationship between the original and the subsequent action. The court below held that since the United States brought the quiet title action in the first instance, it could not later object to the court's exercise of jurisdiction over a remedy (declaring the ownership of the property) the court subsequently ordered:

> We have held that an independent action filed in the same court that rendered the original judgment is a continuation of the original action for purposes of subject matter jurisdiction. It would be anomalous to torpedo a party bringing the independent action with a plea of sovereign immunity when the action is in reality a continuation of

> the original lawsuit in which jurisdiction was not an issue.

Pet. App. 20a-21a. *See generally* Moore's Federal Practice 3d § 60.80.

Petitioner relies heavily on a decision of this Court, *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375 (1994), for the proposition that a federal court lacks ancillary jurisdiction to remedy a judgment previously entered in reliance upon misrepresentation or factual misstatements: "And the relief sought by respondents in this case is not the *effectuation* of the consent judgment entered in *Adams*, but its vacatur." Brief of Petitioners at 22 (emphasis in original). However, *Kokkonen* held that the district court lacked ancillary jurisdiction where the petitioner sought to enforce a settlement agreement which was never placed before the court, and became part of the court's proceedings and judgment entered. As this Court explained: "It must be emphasized that what respondent seeks is enforcement of the settlement agreement, *and not merely reopening of the dismissed suit* by reason of breach of the agreement that was the basis for dismissal." *Id.* at 378(emphasis supplied).

Hence, *Kokkonen* stands for the unremarkable point that ancillary jurisdiction, "which recognizes federal courts' jurisdiction over some matters (otherwise beyond their

competence) that are incidental to other matters properly before them," does not include actions not based on the underlying claim. *Id.* at 378, citing with approval *Fulton Nat'l. Bank of Atlanta v. Hozier*, 267 U.S. 276, 280 (1925)("[N]o controversy can be regarded as dependent or ancillary unless it has direct relation to property or assets actually or constructively drawn into the court's possession or control by the principal suit.")[7].

Indeed, petitioner's entire argument with respect to ancillary jurisdiction confuses the present action with a quite different type of proceeding. The present case is not the wholly different claim (also denoted an "independent action") or entirely separate case. Such an action, in which one court is asked to modify the judgment of another court, is an entirely separate lawsuit with which the new court has no

[7] Likewise, this Court's decisions in *Peacock v. Thomas*, 516 U.S. 349 (1996) and *Stillman v. Combs*, 197 U.S. 436 (1905) can be distinguished. In *Stillman*, the Court held that a federal circuit court lacked ancillary jurisdiction to adjudicate parties' conflicting claims to land, when those parties had earlier dismissed their suit and agreed to support the rights of two of their number to effect a sale of the property to the United States, with an understanding that they would later arbitrate their respective interests in the proceeds. In *Peacock*, the Court held that a federal district court did not possess ancillary jurisdiction over new actions in which a federal judgment creditor ought to impose liability for a new money judgment on a person not otherwise liable for the judgment. Neither of these cases involved the same court that rendered a judgment subsequently modifying the judgment that had been previously obtained because of negligence or misrepresentation.

connection. *See, e.g., Carter v. Attorney General of the United States*, 782 F.2d 138, 142 n.7 (9th Cir. 1986)(*relying on Oliver v. City of Shattuck ex rel. Versluis*, 157 F.2d 150, 152 (10th Cir. 1946))("The rule contains a 'saving provision', the manifest purpose of which is to preserve intact and unimpaired the inherent power of the courts to entertain remedial actions for relief against judgements traditionally recognized at common law....In other words, the judicial process was not rendered less flexible by the advent of the new rule.").

Like any new lawsuit, such an independent action requires a new and independent statutory basis for the exercise of jurisdiction by the new court, as well as a specific waiver of sovereign immunity if the action is against the United States. *See, e.g., Carney v. United States*, 462 F.2d 1142, 1144 (Ct. Cl. 1972)("When the prior judgment attacked in the 'independent action' is that of a different court, the new court must be one having 'independent and substantive equity jurisdiction.'"). *See generally* Moore's Federal Practice 3d §60.84(2)(b).

Moreover, a ruling for petitioner in this case would overrule decisions in virtually every circuit court of appeals in the country that has examined the ancillary jurisdiction of a federal court to entertain an independent action such as the present one. *See, e.g., American Sec. Vanlines, Inc. v.*

Gallagher, 782 F.2d 1056 (D.C. Cir. 1986)("there can be no question of the power of a federal district court to vacate its own orders entered in civil actions over which it had original jurisdiction"); *Indian Head Nat'l Bank of Nashua v. Brunelle*, 689 F.2d 245 (1st Cir. 1982)(court has supervisory power over its own judgments); *Weldon v. United States*, 70 F.3d 1 (2d Cir. 1995)(independent action for relief allowed where court had original jurisdiction over case through statutory waiver of sovereign immunity); *Cresswell v. Sullivan & Cromwell*, 992 F.2d 60 (2d Cir. 1990)("When the basis for federal jurisdiction of the original suit no longer exists. . . the district court that entered the original judgment has inherent 'ancillary' equitable jurisdiction to entertain the suit for relief."); *Laskey v. Continental Products Corp.*, 804 F.2d 250 (3d Cir. 1986)("a court has inherent power to modify a consent decree that it initially had the power to approve."); *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 312 F.2d 702, 705 (5th Cir. 1954)("a court of equity has the jurisdiction and the right in an independent proceeding to protect a litigant from the effects, so far as equitably possible, of a judgment entered by mutual mistake of the parties, where it is shown that the party seeking relief is free from fault or negligence."); *Smith v. Widman Trucking & Excavating*, 627 F.2d 792, 799 (7th Cir. 1980)("If jurisdiction exists at the outset of a suit, subsequent events

will not divest the court of jurisdiction . . .There can be no question of the power of a Federal district court to vacate its own orders. . ."); *see generally* 13 Charles A. Wright, et al., *Federal Practice and Procedure* § 3523 (2d ed. 1984).

Once the one-year time limit for a Rule 60 (b) motion has run, petitioner's approach would strip the federal courts of all of their equitable power to do complete justice in instances where the government has prevailed in a lawsuit based on its misrepresentations or misstatements of fact. To avoid this unacceptable result, courts have repeatedly held – both before and after adoption of Rule 60(b) of the Federal Rules of Civil Procedure – that an independent action based on a court's ancillary jurisdiction is appropriate in the event of fraud on the court[8] or to relieve those judgments that are "manifestly unconscionable." *See Jones v. Anderson-Tully Co.*, 722 F.2d 211 (5th Cir. 1984); *Johnson Waste Materials v. Marshall*, 611 F.2d 593 (5th Cir. 1980); *Pacific R.R. of Missouri v. Missouri Pacific Ry. Co.*, 111 U.S. 505 (1884). Thus, the decision of the court below is in accordance with

[8] Petitioner argues that "[t]here is one important exception that is not at issue in this case. Rule 60(b) also does not limit the power of the court…to set aside a judgement for fraud upon the court." Pet. Br. at 19. In short, Petitioner argues that Rule 60(b) may have preserved ancillary jurisdiction in the event of fraud, while abolishing it in the event of misrepresentation or mistake. However, nothing in the language of the

the general rule that: "To allow the government to use sovereign immunity as a shield where it previously has invoked the court's jurisdiction upon its misrepresentations, negligence, or mistakes would do unacceptable violence to our basic notions of justice." Pet. App. 21a.

B. The Statute of Limitations of the Quiet Title Act's Waiver of Sovereign Immunity is Equitably Tolled Until Discovery of the Mistake.

The Quiet Title Act waives sovereign immunity for the filing of quiet title actions by any individual property owner against the United States with the condition that such lawsuits must be filed within a twelve year time period :

> Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

Rule or its commentary supports such a distinction, and Petitioner has offered no other support.

28 U.S.C. § 2409a(g). *See also Block v. North Dakota*, 461 U.S. 273 (1983).

Under a strict constructionist interpretation of the Quiet Title Act, which petitioner argues for in this case, plaintiffs who discover that the government prevailed in a quiet title action by reason of the government's own mistake or misrepresentation (or even fraud), have no remedy if the plaintiffs discover the mistake outside the twelve year time period. However, as the court below pointed out, such a result would "allow the government to use sovereign immunity as a shield where it has previously subjected itself to the court's jurisdiction and prevailed based upon its misrepresentations, negligence, or mistake, which would do unacceptable violence to our basic notions of justice." Pet. App. 21a.

In 1990, this Court considered and rejected the argument that petitioner puts forward in this case: "Once Congress has made such a waiver, we think that making the rule of equitable tolling applicable to suits against the Government, in the same way that it is applicable to private suits, amounts to little, if any, broadening of the congressional waiver." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)(application of a 30-day statute of limitation for action against the United States based on Title VII of the Civil Rights Act, 42 U.S.C. § 2003-16(c)).

Unless Congress specifically prohibits the application of equitable estoppel, that doctrine (which Congress presumably knows and understands) is presumed to be part of the legislative intent underlying the statute of limitations established by Congress. *Irwin* at 95. As the *Irwin* Court explained: "Such a principle is likely to be a realistic assessment of legislative intent, as well as a practically useful principle of interpretation. . . . Congress, of course, may provide otherwise if it wishes to do so." *Id.*.

Certainly there is nothing in either the text or the legislative history of the Quiet Title Act to suggest that Congress intended to preclude equitable tolling of the time bar. Indeed, when the Quiet Title Act was amended in 1972 to include a twelve-year statute of limitations for plaintiffs, equitable tolling of the limitations period was not even discussed. 1972 U.S. Code Cong. and Adm. News, p. 4550. In a Justice Department letter to which the House Report was addressed, the reason given for a twelve-year limitation was that such a limit would prevent the United States from having to defend against "stale" claims. *Id.* at 4553. The record is silent on the issue of whether the provision was intended to bar claims to correct misrepresentations or misstatements of facts upon which the government had previously prevailed but which were not discovered until much later. A claim, such as the present one, to correct false facts which were

dispositive in the previous trial does not constitute a "stale claim", nor does it appear to be within the contemplation of Congress at the time the Quiet Title Act was passed.

The U.S. Court of Appeals for the Ninth Circuit has specifically rejected all of the arguments that petitioner advances here, holding that equitable tolling applies to the statute of limitations in the Quiet Title Act. *Fadem v. United States*, 52 F.3d 202 (9th Cir. 1995) *vacated*, 117 S.Ct. 1103 (1997), *orig. opinion reinstated*, 113 F.3d 167 (9th Cir. 1997). "In sum, neither the legislative history nor the Court's decision in *Block* precludes application of equitable tolling to suits brought pursuant to the QTA's statute of limitations." *Fadem v. United States*, 52 F.3d at 206.

The holding in both *Fadem* as well as in the court below are consistent with the general rule set forth in *Irwin* that equitable tolling applies against the government. *See, e.g., Krueger v. Saiki*, 19 F.3d 1285, 1286 (8th Cir. 1994)("Because suits against the government are subject to equitable tolling, compliance with [Federal Tort Claims Act] limitations period is not a jurisdictional prerequisite to suing the government."), *cert. denied*, 513 U.S. 905 (1994); *Schmidt v. United States*, 933 F.2d 639, 640 (8th Cir. 1991)(holding that as a result of *Irwin*, statutes of limitations in actions against the government are affirmative defenses rather than jurisdictional bars). *See also Calhoun County v.*

United States, No. 97-40663 (5th Cir. Jan. 22, 1998)(discussing courts' decisions regarding equitable tolling of statutes of limitations in actions against the United States).[9]

Congress knows how to draft a statute of limitations which precludes equitable tolling. In *United States v. Brockamp*, 117 S. Ct. 849 (1997), for example, this Court found that Congress had done just that when it drafted § 6511 of the Internal Revenue Code:

> Section 6511 sets forth its time limitation in unusually emphatic form. Ordinarily statutes used fairly simple language, which one can often plausibly read as containing an implied "equitable tolling" exception . . . But § 6511 uses language that is not simple. It sets forth its limitations in a highly detailed technical manner, that linguistically speaking, cannot easily be read as containing implicit exceptions.

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[9] Furthermore, this case is fundamentally different from the situation involved in this Court's holding in *United States v. Brockamp*, 117 S. Ct. 849 (1997), where application of the *Irwin* rule was rejected because the statute of limitations was not just a time bar but a substantive decision of when penalties would start to accrue. In *Brockamp*, this Court held that applying the doctrine of equitable tolling to the statute of limitations contained in the Internal Revenue Code § 6511 "would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery—a kind of tolling for which we have found no direct precedent." *Brockamp*, 117 S. Ct. at 852.

United States v. Brockamp, 117 S. Ct. at 851. Specifically, § 6511 provides that a

> [c]laim for . . . refund . . . of any tax . . . shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed . . . within 2 years from the time the tax was paid. . . [n]o credit or refund shall be allowed or made after the expiration of the period of limitation prescribed . . . unless a claim for . . . refund is filed . . . within such period.

26 U.S.C. § 6511(a)-(b)(1). This complex and careful language contrasts with the broad language used to create the limitations period in the QTA: "Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. § 2409a(g).

Finally, this case (again in contrast to *Brockamp* where equitable tolling would result in the filing of thousands of tax refund suits) represents the rare circumstance in which the plaintiff was prevented from discovering the facts upon which his claim is based, by the misrepresentations and misstatements of petitioner, until after the statute of limitations (according to petitioner) had run. A ruling in this

case for petitioner would commence the inexorable running of the twelve year statute of limitations when the Plaintiff knows or should know of the claim of the United States – even though that claim is a false one, based on misrepresentation or misstatement of fact. Nothing in the statute or its legislative history suggests that Congress intended petitioner to be able to take private property with impunity, so long as petitioner's mistake went undiscovered for twelve years.

C. Construing the Quiet Title Act's Statute of Limitations to Bar Relief in This Case Would Violate the Due Process and Just Compensation Clauses of the Fifth Amendment.

A statute will ordinarily be construed so as to comport with constitutional limitations. *Communications Ass'n v. Douds*, 339 U.S. 382, 407 (1950)("It is within the power and is the duty of this Court to construe a statute so as to avoid the danger of unconstitutionality if it may be done in consonance with the legislative purpose."). This Court's preference for such an interpretation is predicated on the sound premise that Congress should be presumed to have intended to enact the law in accordance with constitutional provisions, and would prefer that the statute be preserved by

such an interpretation rather than invalidated by a construction that would render it unconstitutional and void. *Becker Steel Co. v. Cummings*, 296 U.S. 74, 79 (1935)("In determining whether the remedy given is thus restricted it must be presumed that Congress intended that it should be constitutionally sufficient.")

A construction of the Quiet Title Act's (QTA) statute of limitations that would save it from a collision with the Fifth Amendment's due process and compensation protections, therefore, will be preferred over one that would render it unconstitutional and void for violation of those provisions.

The Fifth Amendment of the United States Constitution provides that "[n]o person shall . . . be deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation." Petitioner's proffered interpretation of the QTA's statute of limitations (allowing the government to retain title to land which it took on the basis of its own misrepresentations) would render this provision unconstitutional, and is therefore a disfavored interpretation.

The essential guarantee of the Due Process Clause is that of fairness. *Daniels v. Williams*, 474 U.S. 327, 331 (1986)(stating that the purpose of the Due Process Clause is to prevent government from abusing its power or employing

it for purposes of oppression). Government actions that deprive an individual of life, liberty, or property must be fundamentally fair. In practical terms, what the Due Process Clause means is that at a minimum when facts or issues are disputed, then the person whose interests are at stake must be granted a fair procedure to resolve the dispute. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993): As this Court explained:

> "The purpose of this requirement [of due process] is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment – to minimize substantively unfair or mistaken deprivations of property. . ."

Id. at 50, *quoting Fuentes v. Shevin*, 407 U.S. 67, 80-81 (1972).

In the present case, the interpretation of the Quiet Title Act's limitation period urged by the government is patently unfair. The government gained title to Respondents' property in 1982 through its own misrepresentations and the absence of a critical document (the Boudreau Grant) which the government had in its possession at all times.

Respondents brought the instant lawsuit to rectify the mistake made during the prior litigation and clear the cloud on their title to the subject property. Petitioner now argues that the limitations period in the Quiet Title Act operates as a bar to respondents obtaining any procedure to remedy petitioner's prior misrepresentation. However, due process, to the contrary, demands the opportunity for respondents to have a fair hearing on their claims. Accordingly, the Quiet Title Act should be construed in a manner that allows respondents full and fair opportunity to challenge the government's claim of title, consistent with the requirements of the Due Process Clause.[10]

Similarly, the Just Compensation Clause of the Fifth Amendment contains no limitations or exceptions for its guarantee and the government may not refuse such compensation where a taking has occurred. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987). The obligation for just compensation simply attaches whenever government

[10] In fact, the government itself appears to have laid bare its intention to prevent a fair hearing of these claims almost thirty-years ago. A Department of Interior land acquisition officer told respondent James R. Beggerly: "Mr. Beggerly, there is something you need to know. In the end, we will have your property and it will be on our terms and our conditions. We will either wear you out, break you, or both." Affidavit of James R. Beggerly, J.A. 88.

action works a taking of private property rights. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). This constitutional obligation is so evident that this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy to which he is entitled if private property is taken. *First English*, 482 U.S. at 304; *United States v. Clarke*, 445 U.S. 253, 257 (1980).

This guarantee of just compensation applies whether property is taken through the traditional process of eminent domain or through other means. In *Kaiser Aetna v. United States*, the owner of a pond created a channel which connected it with open water. 444 U.S. 164 (1979). The government then asserted jurisdiction over the pond on the grounds that it had become a navigable water of the United States, available for public use. This Court, however, established the Fifth Amendment limitation upon such a construction:

> [T]he Government must condemn and pay before it takes over the management of the land-owner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the

> Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately-owned marina. [citations omitted] And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation.

Id. at 179-80.

In the case at bar, the government's interpretation of the limitations provision of the Quiet Title Act results in a confiscation of private property without just compensation in violation of the Fifth Amendment. Respondents did not have any factual basis on which to bring a Quiet Title Act claim until at least 1991, when the Boudreau Grant was discovered in the National Archives. Any Quiet Title Act claim brought by respondents prior to that time, lacking any evidence of a valid grant or patent, would have had no factual basis and would not have survived a Rule 12(b)(6) challenge under the Federal Rules of Civil Procedure. Yet, according to petitioner, the limitations period on such a claim would have run out before respondents discovered the Boudreau Grant evidencing their claim in 1991.

Therefore, the petitioner was able in this case to obtain possession and title to private property as a direct

result of its own misrepresentation to the court in the 1979 quiet title action, paying a nominal price for the land far below the value of the comparable property. Petitioner will never be subject to any action for relief of this taking of private property if respondents cannot now challenge the government's claim to title after they have finally found the true land grant. Such a result is indistinguishable from a case where the government had simply condemned respondents' property for use in the federal park system with one crucial difference—in the present case the petitioner has avoided payment of just compensation through its own misrepresentations. The Quiet Title Act must be interpreted in accord with the Just Compensation Clause to allow property owners the ability to resolve title disputes with the government where the government avoided payment of just compensation because of fraud or mistake of fact that is not discovered until after the Act's limitations period would have otherwise expired.

II. THE CASE WAS RIGHTLY DECIDED.

The court below held that, as a matter of law, the 1781 grant of land on Horn Island by Spanish Governor General Bernardo de Galvez to Catarina Boudreau was a valid transfer of the subject property out of the public domain

into the hands of respondents' predecessor-in-interest. *Beggerly v. United States*, 114 F.3d 484, 488 (5th Cir. 1997). At no point in this litigation has petitioner questioned the factual basis for the existence of the Boudreau Grant. Instead, petitioner now questions the legal validity of the Boudreau Grant under the theory that Galvez did not have the authority to make such a grant based on this Court's decision in *United States v. Power's Heirs*, 52 U.S. (11 How.) 570 (1851).

Moreover, petitioner also now raises, for the first time in this litigation, a "grab bag" of theories, such as adverse possession and incomplete chain of title, that purport to show how the Fifth Circuit erred in ruling that respondents hold superior title to the subject property as compared to petitioner.[11] None of the theories advanced by petitioner,

[11] Petitioner challenges the authority of Bernardo de Galvez to issue the Boudreau Grant for the first time in this Court. This Court has repeatedly held that it will not consider questions not raised by the parties in the courts below. *See, e.g., Oklahoma Tax Comm. v. Chickasaw Nation*, 515 U.S. 450 (1995)(Court will not consider claim raised for the first time in state's brief on the merits that a federal statute expressly authorized states to tax motor fuel on Indian reservations); *United States v. Larkin*, 59 U.S. 557 (1855)(objection that Mexican grant was fictitious could not be raised for the first time in Supreme Court). Likewise, petitioner also raised for the first time in its brief on the merits an adverse possession claim. Clearly it is now too late to assert this affirmative defense. Pursuant to Rule 8 (c) of the Federal Rules of Civil Procedure, a party must set forth all affirmative defenses. Petitioner has not asserted this defense in its answer to the complaint, J.A. 28-37, nor did it raise the

however, provide a reason for this Court to overturn the decision by the court below.[12]

A. This Case Is Not Controlled by *Power's Heirs*.

Petitioner contends that this Court's decision in *United States v. Power's Heirs*, 52 U.S. (11 How.) 570 (1851), "compels the conclusion that the Boudreaux Grant

defense in any of the proceedings below. Hence, this Court should not rely on these arguments at this late date.

[12] Petitioner also contends that the court below lacked jurisdiction to decide the summary judgment motion. Pet. Br. at 30. This assertion, however, is incorrect. As precedent for this proposition, Petitioner relies, in large part, on Ninth Circuit decisions holding that denial of summary judgment is never reviewable on appeal from the court's dismissal for lack of subject matter jurisdiction. *See Burke v. Ernest W. Hahn, Inc.*, 592 F.2d 542, 546 (9th Cir. 1979). The better rule, and the one followed by the majority of circuits, however, is a rule that focuses on whether the question before the reviewing court is one of fact or law. For example, in *Swaback v. American Info. Technologies Corp.*, 103 F.3d 535 (7th Cir. 1996), the Seventh Circuit held that "[t]he reason that appellate courts, when reversing a grant of summary judgment, typically do not direct the district court to enter summary judgment in favor of the appellant is because a genuine issue of material fact remains . . . But, in instances in which the facts and law establish that the appellant is entitled to judgment as a matter of law, we are free to direct the district court to enter judgment in appellant's favor." *Id.* at 543-44. *See also Sacred Heart Medical Center v. Sullivan*, 958 F.2d 537, 544 (3d Cir. 1992)(holding that where cross summary judgment motions are filed, appellate court may properly review and set aside denial of summary judgment where facts are uncontroverted). There are no disputes of material fact in this case. Petitioner has not questioned the existence of the Boudreau Grant (the primary factual basis for this lawsuit), but merely its legal significance. Moreover, Petitioner has not to date disputed any facts surrounding Respondents' conduct after the conclusion of the *Adams* litigation. As a result, the only issues before the court below concerned matters of law, and were thus properly resolved below.

would *not* have been valid when it was purportedly made." Pet. Br. at 37. However, petitioner's reliance on *Power's Heirs* in the instant case is misplaced.

In *Power's Heirs*, the respondents traced their title to the subject property in that case back to a grant purportedly made by Governor General Galvez to Francisco Caminada on August 1, 1781. This grant was evidenced solely by a secondhand copy of the grant found in the records of the Spanish notary office in New Orleans, described by Justice Catron as an "unsupported and mutilated copy . . . unaccompanied by a plan of survey and process verbal." *Power's Heirs*, 52 U.S. at 577.

The Court held that this evidence alone did not support the finding that the grant was valid, since other items required by the applicable Spanish law of the time (all of which are present in this action) were missing from the record.

Further, the Court held that Galvez did not have authority to make grants in West Florida in 1781 because the evidence before the Court showed only that Galvez was Governor of Louisiana (which did not encompass the West Florida territory), and the record did not indicate that the King of Spain had granted Galvez any additional authority prior to 1783. *Id.* at 579-80. As a result, the Court held that

the grant to Caminada, even if it existed, had no force. *Power's Heirs*, 52 U.S. at 580.

1. *Stare Decisis* Does Not Require This Court To Follow Its Holding In *Powers' Heirs.*

This Court is not, as petitioner contends, bound by *stare decisis* to its holding in *Power's Heirs.* The holding of *Power's Heirs* concerned an interpretation of the law of a foreign sovereign—eighteenth century Spain—and this Court has long held that such decisions do not fall within the doctrine of *stare decisis.* As a result, the holding of *Power's Heirs* concerning the ability of Galvez to make land grants does not control this case and should be reversed by this Court in light of the historical evidence in the record that was not brought before the Court in 1851.

This Court's "customary practice of *stare decisis*" does not extend to treaty interpretation or foreign laws. As stated in R.B. Schlesinger *et al.*, *Comparative Law* 88 (5th ed. 1988): "A judicial decision on a point of foreign law is generally held not to constitute the binding precedent."

In *Summe Corp. v. California ex rel. Lands Comm'n*, 466 U.S. 198, 201-02 n.1 (1984) where a Mexican grant of land in California was at issue, this Court stated that it was "beyond cavil that we may take a fresh look at what Mexican

law may have been [at the time of the grant]." Moreover, this Court has held that federal court interpretation of the law of foreign sovereigns is analogous to federal court interpretation of state law:

> It is proper to remark, that the laws of these territories under which titles were claimed, were never treated by the court as foreign laws, to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a State of the Union.

Fremont v. United States, 58 U.S. (17 How.) 542 (1855). As is the case when federal courts apply state law, the law of former foreign sovereigns is not "foreign" law as such, but falls to be ascertained by this Court (through a "fresh look" if need be) and applied to the case at hand. Its *source*, however, is foreign and not shaped and developed by this Court in the same manner as the federal law of the United States. Accordingly, this Court's "customary practice of *stare decisis*" invoked by petitioner, Pet. Br. at 43, in support of the precedential value of *Power's Heirs* as to findings of Spanish law is inapplicable in the present case.

2. The Holding In *Powers' Heirs* Is Inapposite To The Present Case Because It Rested On Significantly Different Facts.

This Court's holding in *Power's Heirs* was predicated on the fact that the actual grant at issue in that case had not been located but was instead evidenced only by incomplete secondhand sources. In contrast, respondents' title is based on the Boudreau Grant that is evidenced by a complete case file of that grant, consisting of application, order of survey, survey, and grant, tendered by the heirs of the grantees to the authorities of the United States in 1816. J.A. 103-05. This fact lends tremendous weight to the conclusion of the court below that the respondents' predecessors in interest were, in fact, granted the property by Galvez in 1781 and easily distinguishes the present case from *Power's Heirs*, where this Court found cause to express skepticism over the actual existence of any grant from Galvez to Caminada.

Moreover, it is apparent from the decision itself that this Court in 1851 had an incomplete record before it when it made the decision and hence erroneously concluded that the King of Spain had not granted Spanish Governor General Bernardo de Galvez authority to issue grants in Mississippi in 1781:

> Nothing is found in these historical details indicating that the Spanish laws had been introduced into Florida, and superseded those of England, and that civil power had been vested in Galvez to grant lands. *As this could only be done by the king, all presumptions are opposed to such supposition.*

United States v. Power's Heirs, 52 U.S. (11 How.) 570, 579 (1851)(emphasis supplied).

The complete historical record, that was available to the court below through expert testimony of Dr. Hans Baade, clearly and unambiguously reveals that the King of Spain had granted Galvez authority to make land grants in the Mobile District well before August 1, 1781. J.A. 131.

The *Power's Heirs* Court based its decision on the "history of Florida and of its conquest by Spain" so far as then within judicial notice. The Court noted the conquest of Mobile from the British by Galvez on March 14, 1780, and that of Pensacola on May 9, 1781. The Caminada grant of August 1, 1781, this Court stated:

> purports to have been made within eighty days after the capitulation of Pensacola; a time, at that day, hardly sufficient to have heard from Spain, after the account of the capitulation reached there, had there been no hostile

> British fleet intervening to intercept intercourse.

Power's Heirs, 52 U.S. (11 How.) at 579. However, as set forth in Section II (B), *infra*, Spanish archival records clearly show that Galvez was in communication with the authorities in Spain at all stages of his campaign against the British and that Galvez had been informed well before August 1, 1781 that he had been made "Governor of Louisiana and Mobile" by the King of Spain.

These sources of information regarding the authority of Galvez were unavailable to the Court in 1851, however. The primary official source for such historical information is the Spanish archives of Louisiana and the Floridas, catalogued as the "Papeles Procedentes de Cuba" in the Archivos General de Indias in Seville, Spain. These documents reached Spain from Havana between 1885 and 1889. As a practical matter, however, this collection did not became available to scholars in the United States until 1916.[13]

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[13] This information was published in the United States in 1916 as *Descriptive Catalogue of the Documents Relating to the History of the United States* in the *Papeles Procedentes de Cuba deposited in the Archivo General de Indias at Seville*, published by Roscoe R. Hill, Professor of History at the University of New Mexico, under the auspices of the Carnegie Institution. Based on two years' research *in loco* by

Because neither the records in the Archivos General de Indias nor the scholarly interpretations of these records were available to this Court in 1851, the Court's holding in *Power's Heirs* questioning the authority of Galvez to grant land in the Mobile District must be reevaluated and rejected in light of the scholarship that has emerged in this century concerning this question.

B. The 1781 Land Grant Conveyed Title To Respondents' Predecessors.

The historical record as it is available today clearly indicates that Bernardo de Galvez was, in fact, the "Governor of Louisiana and Mobile" for several months before granting Horn Island to the widow Catarina Boudreau, and therefore,

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Professor Hill, this catalogue opened up, in his words, a "virgin field for investigation." *Id.*, introduction at xxxiii.
Moreover, Spanish archive-based research on the legal history of Spanish North America is of even more recent origin. Serious historical work on the subject began primarily with the work of Professor Hans W. Baade of the University of Texas Law School, whose research in the Archivo General de Indias is reflected mainly in "The Formalities of Private Real Estate Transactions in Spanish North America, A Report on Some Recent Discoveries," 38 La. L. Rev. 655 (1978) and "Marriage Contracts in French in French and Spanish Louisiana: A Study in Notarial Jurisprudence," 53 Tulane L. Rev. 1 (1979). Indeed, it was Professor Baade's unparalleled reputation and accomplishment in this field that led respondents to seek his opinion on the validity of the Boudreau Grant in the form of a legal memorandum. See J.A. at 117.

Galvez had full authority under Spanish law to grant portions of Horn Island to respondents' predecessor in interest.[14]

The Mobile District, which included the property at issue in this case, was under the authority of Spanish law at the point that British forces in Pensacola capitulated to Governor Galvez in May 1781—approximately three months before Galvez granted the subject property to Catarina Boudreau. In their draft of the Articles of Capitulation, the British officials in charge of West Florida, successfully conquered by Governor Galvez, proposed to leave the ultimate fate of the Province of West Florida to the determination of the respective sovereigns. This was rejected by Galvez, who substituted language confirming immediate

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[14] Petitioner also asserts that "respondents have not established a chain of title between themselves and Boudreau." Pet. Br. at 47. Respondents, however, need not establish such a chain of title to quiet title against the petitioner's claim because petitioner asserts title based on the 1803 Louisiana Purchase. "A plaintiff in an action to quiet title has the burden to prove title superior to the other party, not superior to the whole world, and must prevail on the strength of its own title and not on any weakness in the title of the other party." *Ollison v. Village of Climax Springs*, 916 S.W.2d 198, 203 (Mo. 1996). *See also United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982)(holding that court may finally determine conflicting title claims as between parties). Respondents' title does not derive from the Boudreau Grant, but from the 1950 Mississippi tax foreclosure sale. The Boudeau Grant has been proffered by respondents to demonstrate that the subject property was deeded out of the public domain before the Louisiana Purchase. By providing proof of their own title and proof that petitioner has no valid claim based on the Louisiana Purchase, respondents have clearly met their burden of proving title superior to that of petitioner.

Spanish sovereignty over the province. *See* Carmen de Reparaz, *Yo Solo. Bernardo de Galvez y la Toma de Panzacola en 1781*, Una Contribución Española a la Independencia de los Estados Unidos 256, 239-42 (1986). Therefore, contrary to petitioners' assertions regarding the status of West Florida and the Mobile District as a result of conquest, the document of surrender signed by the vanquished British forces explicitly recognized that West Florida would be governed as Spanish territory under principles of Spanish law.

As readily ascertainable from Spanish records now accessible, Galvez was in regular communication with royal authorities in Madrid at all stages of the West Florida campaign. Furthermore, with the conquest of Mobile, Galvez was already in control of the Mobile District by March 14, 1780, more than seventeen months before the Boudreau Grant of August 1, 1781. As Professor Caughey[15] has noted: "Manifestations of royal appreciation of Galvez' good work at Mobile were soon forthcoming." John Walton Caughey, *Bernardo de Galvez in Louisiana* 186 (1934).

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[15] Professor John Walton Caughey's book *Bernardo de Galvez in Louisiana* (1934) was one of the first major works of scholarly research in this field.

After discussing a letter to Galvez from his uncle, the Secretary of the Indies, Professor Caughey goes on to state:

> Finally, in reward for the capture of Mobile, Galvez was made field marshal in command of Spanish operations in America, and he received the augmented title, "Governor of Louisiana and Mobile."

Id. at 212 (citing Galvez to Galvez, February 12, 1781, A.G.I., Cuba 175). In addition to Galvez' royal grant of authority as Governor of Louisiana and Mobile, the King issued a royal order, also on February 12, 1781, that provides further proof of Galvez authority to govern the Mobile District:

> The King, having considered the great extent acquired by the Province of Louisiana through the conquests that you have made of the English Ports and Settlements on the Mississippi and at Mobile, and having in mind the decorum with which you should be treated as Commander-in-Chief of the Arm of Operations at Havana; has been pleased to decree that, for the present, and while you govern Mobile and Louisiana, their administration shall be independent of the Captaincy General of the Island of Cuba, and that Pensacola and its district shall be added to your jurisdiction as soon as they are occupied by the forces of the King, who fully authorizes

you to govern and defend them through Substitutes during your absence.

Translation of Royal Order of Charles III, dated February 12, 1781, set forth in D. Corbitt, *The Administrative System in the Floridas, 1781-1821*, 1 *Tequesta* No. 2, 41-42 (Aug. 1942).[16]

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[16] Petitioner argues that principles of international law dictate that the mere fact of conquest did not permit Galvez, or the King of Spain, for that matter, to assert governing authority over the Mobile District absent a formal treaty providing for annexation of the conquered territory. Pet. Br. at 39-42. This contention, however, is erroneous. Petitioner fails to cite the leading contemporaneous American treatise of H.W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War* (1861). Halleck states that:

> by the just rules of war, the conqueror has the same right to use or alienate the public domain of the conquered or displaced government, as he has to use or alienate its moveable property . . . the purchase of any portion of the national domain of a conquered country takes it at the risk of being evicted by the original sovereign owner, if he should be restored to the possession of his dominions. But if such restoration should not take place, and the title of the conqueror should be confirmed by some of the modes recognized by international law, the title of the purchaser is then made perfect. It was before, a good and valid title against all except the original sovereign owner, under the *jus postliminii*, which right is completely extinguished by a confirmation of the conquest.

Id. at 448-49. Moreover, this Court has also recognized this fundamental principle of international law. In *Fremont v. United States*, 58 U.S. (17 How.) 542 (1854), this court stated that "there is no principal [sic] of public law which prohibits a citizen of a conquering country from purchasing property, real or personal, in the territory thus acquired and held; nor is there any thing in the principles of our government, in its

Moreover, Governor Galvez began to exercise his civil authority almost immediately after conquering Pensacola on May 9, 1781. Professor Caughey states that:

> Galvez left soon after the prisoners, giving final instructions on June 4 to Arturo O'Neill, who was to be the new commander at Pensacola. His instructions related mostly to military defense, but since the town's principal merchants had expressed concern that the "Courts of Judicature" should continue to operate, he ordered O'Neill to promulgate the Code O'Reilly, which had been the basic law of Louisiana since November 25, 1769.

Caughey, at 212. The "Code O'Reilly," under which Spanish Louisiana was governed during this period, had transformed Louisiana into a Spanish province subject to the same laws as other Spanish possessions in the Americas. *See* A. N. Yiannopoulos, "The Civil Codes of Louisiana," in A. N. Yiannopoulos, ed., *Louisiana Civil Code*, 1997 Edition XIX-XX (1997). Accordingly, by applying the Code O'Reilly to the Mobile District in May, 1781, Galvez used

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policy or its laws, which forbids it." *Id.* at 564. Accordingly, international law clearly recognizes the title to property granted by conquering sovereigns prior to the conclusion of a formal peace treaty.

his authority as Governor of Louisiana and Mobile to implement Spanish law in the Mobile District, under which Galvez had unquestionable authority to make grants of land.

Official news and full documentation of the conquest of West Florida reached Spain on July 27, 1781. On August 12 of that year, Charles III created a new Captaincy General of Louisiana and West Florida, and appointed Galvez the first Governor of Louisiana and West Florida.

Even though this title was given to Galvez after he made the Boudreau Grant, Galvez' prior royal grant of authority as "Governor of Louisiana and Mobile," coupled with his promulgation of the Code O'Reilly into the Mobile District in May, 1781, clearly show that he had the authority to apply Spanish law to Horn Island as part of the Mobile District, including the authority to grant the Island to private individuals. As a result, the Boudreau Grant was a completely valid grant vesting title in the respondents' predecessors in interest.

CONCLUSION

The judgement of the Court of Appeals should be affirmed.

Respectfully submitted,

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